It is beyond rational dispute that the grant of a leave of absence from the AAG position and the CBU, with continued protection of the CBA, was a condition precedent to Bouton's accepting the appointment as AHO. When the Mercer Agreement was declared to be a "nullity," Bouton's obligations under the agreement, which included his acceptance of the appointment to the AHO position, were vitiated.

It is clear that Bouton served as an administrative hearing officer only in an acting capacity; that he remained an assistant attorney general; a member of the collective bargaining unit under the protection of the collective bargaining agreement and was dismissed from the collective bargaining unit in violation of Articles X and XIX of the collective bargaining agreement (Pps. 29-36). The Government's failure to appoint Bouton to an AAG position after dismissing him from the acting AHO position, constituted a breach of a contract of which Bouton was a beneficiary, and as such, was damaged by the Government's breach.

The Court of Appeals' Opinion conflicts with Article XIV of the Constitution of the United States. It endorses a violation of Section 1 of Article XIV by the respondents to the detriment of Bouton who has been deprived of a property right to employment as beneficiary under the terms of the government's collective bargaining agreement with the union without due process of law. Lynch v. U.S., 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934).

CONCLUSION

The record is devoid of evidence supporting the judgment of the Court of Appeals. The petition for a rit of certiorari should be granted.

Respectfully submitted this 1st day of August, 2005.

DONALD M. BOUTON
PETITIONER, *pro se*
3005 East Second St.
Tucson, AZ 85716-4112

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD M. BOUTON, PETITIONER,

vs.

ALEXANDER FARRELLY in his capacity as Governor of the Virgin Islands; V.I. DEPARTMENT OF JUSTICE(Formerly Department of Law); and GOVERNMENT OF THE VIRGIN ISLANDS, RESPONDENTS.

PROOF OF SERVICE

I, Donald M. Bouton, do swear or declare that on this date, August 31st, 2005, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Michael Law, Esq., Assistant Attorney General
Department of Justice, GERS Complex
48B-500 Krunprindsens Gade
St. Thomas, U.S. V.I. 00802

I declare under penalty of perjury that the foregoing is true and correct.

Donald M. Bouton

Executed on July ____, 2005.

DONALD M. BOUTON

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2560

DONALD M. BOUTON,
Appellant
v.
ALEXANDER FARRELLY
in his capacity as Governor of the Virgin Islands;
V.I. DEPARTMENT OF JUSTICE
(Formerly Department of Law);
GOVERNMENT OF THE VIRGIN ISLANDS

On Appeal from the District Court of the Virgin Islands,
Division of St. Thomas Appellate Division
(D.C. No. 02-cv-00165)
District Judges: Hon. Raymond L. Finch, Hon. Thomas K. Moore,
and Hon. Patricia D. Steele

Submitted Under Third Circuit LAR 34.1(a)
December 13, 2004

Before: SLOVITER FUENTES and GREENBERG, Circuit Judges
(Filed: December 15, 2004)

APPENDIX A

OPINION OF THE COURT

SLOVITER, Circuit Judge.

Before us is the appeal of Donald Bouton, acting pro se, from the decision of the Appellate Division of the District Court of the Virgin Islands, Division of St. Thomas, which affirmed the decision of the Territorial Court dismissing Bouton's breach of contract claim instituted against Virgin Islands Governor Alexander Farrelly, the Virgin Islands Department of Justice, and the Government of the Virgin Islands.[1] This court has previously set forth the underlying facts of this case at United Indus. Workers, Serv., Transp., Prof'l Gov't of N.Am. Of the Seafarers' Int'l Union of N.Am., Atl., Gulf, Lakes and Inland Waters Dist. AFL-CIO, Local No. 16 ex rel. Bouton v. Gov't of the V.I., 987 F.2d 162 (3d Cir. 1993) ("Bouton 1"). In the interest of brevity, the facts will be reiterated here only to the extent necessary to resolve the instant appeal.

Bouton had worked as an Assistant Attorney General in the Virgin Islands Department of Law (subsequently renamed the Virgin Islands Department of Justice) since 1978. In 1986, the Governor of the Virgin Islands appointed Bouton to the newly created position of Administrative Hearing Officer ("AHO") in the Paternity and Child Support Division of the Department of Law.[2]

Approximately a month after his appointment, Bouton rote to then Virgin Islands Attorney General Leroy Mercer to propose terms for his acceptance of the AHO position. Specifically, he asked to be

---

[1] The District Court had jurisdiction pursuant to the Revised Organic Act of 1954, 48 U.S.C. §§1541-1645, and 4 V.I. Code Ann. §33. This court has jurisdiction under 28 U.S.C. §§1291, 1294(3), and 48 U.S.C. §1613a(c).

[2] Under Virgin Islands law, AHOs hold their position for a term of four years; the Governor, however, may reappoint an AHO to successive four-year terms. 16 V.I. Code Ann. §354(a). Although AHOs are appointed by the Governor, the Attorney General has some ability to control the day-to-day operations of AHOs. 16 V.I. Code Ann. §354(d).

placed on a leave of absence from his Attorney General position. Bouton apparently believed that such an arrangement would permit him to return to his position as an Assistant Attorney General if and when his position as an AHO was terminated. Attorney General Mercer wrote "Agreed" on this letter, initialed the document, and returned a signed copy to Bouton. Bouton 1, 987 F.2d at 165. This court, however, later noted that Attorney General Mercer had no authority to bind either the Governor or future Attorneys General. Id.

In January of 1987, Godfrey de Castro, then Attorney General of the Virgin Islands, issued a directive requiring each male professional employee to wear a coat and tie at work. Bouton, who was at that time acting in his capacity as an AHO, refused to comply, based on an alleged physical condition which made compliance uncomfortable. He filed a grievance pursuant to the collective bargaining agreement ("CBA") covering Assistant Attorneys General, in which he sought to raise the issue of the dress code. Bouton's grievance was denied on the ground that AHOs were not covered under the CBA.

Bouton continued to disregard the dress code directive and was fired in March 1987. Bouton filed an action in the Territorial Court of the United States Virgin Islands seeking reinstatement. The United Industrial Workers, Service, Transportation, Professional Government of North America of the Seafarers' International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District American Federal of Labor-Congress of Industrial Organizations, Local Number 16 (the "Union") intervened on behalf of Bouton. The Union was the exclusive bargaining unit of the Assistant Attorneys General under the CBA. In April 1987, the Territorial Court referred the dispute to binding arbitration for resolution. The arbitrator found that Bouton was not covered by the CBA and therefore dismissed his complaint.

The Union filed a petition in the District Court for the Virgin Islands seeking to vacate the arbitrator's decision, which that court denied. This court affirmed the district court's order. See Bouton 1, 987 F.2d at 172.

Approximately a week after this court rendered its decision, Bouton

filed an action for breach of contract in the Territorial Court against the current Appellees. In his complaint, Bouton averred that the Appellees breached their employment contract with him by dismissing him from his position as an AHO. In addition, the complaint alleged that the Appellees breached their agreement to reinstate him as an Assistant Attorney General following his removal from the AHO position. Some nine years later, the Territorial Court granted summary judgment in favor of the Appellees. Bouton then appealed this decision to the Appellate Division of the District Court of the Virgin Islands, see generally 4 V.I. Code Ann. §33, which affirmed. This appeal followed.

I.

This court reviews de novo the decision of the Appellate Division of the District Court of the Virgin Islands affirming the grant of summary judgment. See Tyler v. Armstrong, 365 F.3d 204, 208 (3d Cir. 2004).

Bouton argues that he served as an AHO only in an acting capacity, that he remained an Assistant Attorney General throughout his tenure as acting AHO, and thus that he was protected by the CBA at the time he was removed from the AHO position.[3] As recounted above, shortly after Bouton's appointment to the AHO position, then Attorney General Mercer purportedly entered into an agreement with Bouton whereby Bouton would take a leave of absence from the Attorney General's Office in order to take the AHO position. Bouton believed that this entitled him to the first available opening in the Attorney General's Office if and when his AHO position was terminated. Bouton asserts that he only accepted the AHO position on the express conditions precedent that he be granted a leave of absence from the Assistant Attorney General position and that, if his AHO position were terminated, he would be appointed to the first available vacancy in the Attorney General's Office.

In Bouton 1, we held that the CBA governing Assistant Attorneys

---

3

Despite the Appellees' protestations to the contrary, Bouton states that he is not seeking to relitigate the decided issue that AHOs are not covered by the CBA.

General proscribed leaves of absence in excess of one year. Bouton 1, 987 F.2d at 165. Thus, Mercer and Bouton's agreement that Bouton was accepting the AHO position on the condition of his being placed on an extended leave of absence was contrary to the CBA and void. We further noted that although Mercer agreed to Bouton's conditions of acceptance, Mercer had no authority to bind the Governor, future Attorneys General, or the Government of the Virgin Islands. Id. Rather, under Virgin Islands law only the Governor has the authority to appoint Assistant Attorneys General. See 3 V.I. Code Ann. §113(a). It followed that in promising Bouton future employment, Mercer acted ultra vires and in no way bound the Appellees. See SIU de P.R., Caribe y Latinoamerica v. V.I. Port Auth., 42 F.3d 801, 803 (3d Cir. 1994); Tracy Leigh Dev. Corp. V. Gov't of the V.I., 501 F.2d 439, 443 (3d Cir. 1974); In re Estate of Hooper, 359 F.2d 569, 577 (3d Cir. 1966).

Bouton does not dispute the fact that the agreement with Mercer is null and void. Rather, he contends that because the Mercer agreement is void, his obligations under the agreement, including his acceptance of the AHO position, are also void. In fact, Bouton argues that due to the unenforceability and attendant failure of the purported conditions precedent, he never accepted the AHO position and remained an Assistant Attorney General protected by the CBA.

We reject Bouton's position. Because it is the Governor of the Virgin Islands who appoints individuals to the position of Administrative Hearing Officer, Bouton's agreement to accept appointment as an AHO was with the Governor; Mercer had no authority to agree to conditions that would bind the Appellees.

The fact that Mercer, acting ultra vires, attempted to add conditions precedent to Bouton's agreement to serve as an AHO did not affect the enforceability of Bouton's acceptance of an appointment as an AHO and his attendant decision to step down as an Assistant Attorney General. Because Bouton was an AHO, he was not protected by the CBA at the time of his termination and therefore could be removed from his position for cause. 16 V.I. Code Ann. §354(a). His failure to comply with the dress code provided such cause. The District Court

did not err in upholding the Territorial Court's grant of summary judgment in favor of the Appellees.

II.

For the reasons set forth, we will affirm the judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2560

DONALD M. BOUTON,
Appellant
v.
ALEXANDER FARRELLY
in his capacity as Governor of the Virgin Islands;
V.I. DEPARTMENT OF JUSTICE
(Formerly Department of Law);
GOVERNMENT OF THE VIRGIN ISLANDS

On Appeal from the District Court of the Virgin Islands,
Division of St. Thomas Appellate Division
(D.C. No. 02-cv-00165)
District Judges: Hon. Raymond L. Finch, Hon. Thomas K. Moore,
and Hon. Patricia D. Steele

Before: SLOVITER, FUENTES and GREENBERG,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands and was submitted pursuant to Third Circuit LAR 34.1(a) on December 13, 2004.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the Order of the said District Court entered May 5, 2004, be, and the same is, hereby AFFIRMED. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
/S/ Mareen M. Waldrom, Clerk

Dated: 15 December 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2560
DONALD M. BOUTON,
Appellant
v.
ALEXANDER FARRELLY
in his capacity as Governor of the Virgin Islands;
V.I. DEPARTMENT OF JUSTICE
(Formerly Department of Law);
GOVERNMENT OF THE VIRGIN ISLANDS

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, VAN ANTWERPEN and GREENBERG, *Circuit Judges[1]

The petition for rehearing filed by Appellant Donald M. Bouton in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/s/ Dolores K. Sloviter, Circuit Judge

Dated: 2 February 2005

* Hon. Morton I. Greenberg, Senior Circuit Judge, as to panel rehearing only.

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS
APPELLATE DIVISION

DONALD M. BOUTON,
Appellant,

D.C. Civ. App. No. 2002-165
Re: Terr. Ct. No. 151/1993

v.

ALEXANDER FARRELLY in his capacity as Governor of the Virgin Islands, V.I. DEPARTMENT OF JUSTICE (formerly Department of Law), and GOVERNMENT OF THE VIRGIN ISLANDS,
Appellees.

On Appeal from the Territorial Court of the Virgin Islands
Considered: February 27, 2004
Filed: May 4, 2004

Before:
RAYMOND L. FINCH, Chief Judge of the District Court of the Virgin Islands; THOMAS K. MOORE, Judge of the District Court of the Virgin Islands; and PATRICIA D. STEELE, Judge of the Territorial Court, Division of St. Croix, sitting by designation.

Attorneys:
Donald M. Bouton, Pro Se
Silver City, NM
For the Appellant,

Michael Law
Assistant Attorney General
V.I. Department of Justice, St. Thomas, V.I.
For the Appellee.

APPENDIX B

MEMORANDUM

I. SUMMARY

Donald M. Bouton has appealed the trial judge's decision to dismiss his complaint, with prejudice. For the reasons stated below, we will affirm the trial judge's decision.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1978, the Virgin Islands Department of Law hired Bouton as an Assistant Attorney General.[1] Bouton thereafter held various positions in the Department of Law, and was serving as an Assistant Attorney General in 1986 when he was appointed to a four-year term to the newly-created position of Administrative Hearing Officer ("AHO") IN THE Department'S Paternity and Child Support Division. Before formally accepting the appointment, Bouton wrote to then-Attorney General Leroy Mercer on September 17, 1986 to propose terms for his acceptance of the position. Specifically, Bouton asked to be placed on leave of absence from his position as Assistant Attorney General, thereby allowing him to return to the position after his term as an AHO ended.

Seven days after the decision of the Court of Appeals, Bouton filed a complaint in Territorial Court against the appellees. (J.A. at 96.) Count I of Bouton's complaint alleged that the appellees breached their employment contract with him by dismissing him from his position as an AHO. (Id. At 99.) Count II alleged that the appellees breached their agreement to reinstate him as an Assistant Attorney General following his termination. (Id. At 100.) Both sides moved for summary judgment. The trial judge granted the government's motion and dismissed Bouton's complaint. (Id. At 9.) The trial judge ruled that Count I did not present a viable claim as the Court of Appeals had affirmed the arbitrator's decision that the collective bargaining agreement did not extend to AHOs, thus allowing Bouton to be fired for cause. (J.A. at 7.) After considering Bouton's arguments regarding Count II, the trial judge found them to be without merit and dismissed the complaint. (J.A. at 7-9). Bouton has appealed the trial judge's decision.

III. ANALYSIS

A. Jurisdiction and Standard of Review

This Court has jurisdiction to review final judgments and orders of the Territorial Court in all civil matters. See V.I. Code Ann. Tit 4, §33.[2] The standard of review in an appeal from a grant of summary judgment is plenary. Virgin Islands Bldg. Specialties, Inc. v. Buccaneer Mall Assoc., 197 F.R.D. 256, 260 (D.V.I. App.Div. 2000); Roach v. West Indies Inv. Co., 42 V.I. 238, 94 F.Supp. 2d 634 (D.V.I. App.Div. 2000). Summary judgment is appropriate only when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A "genuine" dispute exists when the evidence would allow a reasonable jury to return a verdict for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The trial court must accept any fact advanced by the non-moving party through admissible affidavits and evidence as true and resolve any doubt in that party's favor. See Brown v. Vitelcom, Inc., 41 V.I. 253, 257, 47 F.Supp. 2d 595, 598 (D.V.I. 1999).

B. The Trial Judge's Decision to Grant Summary Judgment and Dismiss Bouton's Complaint Was Correct As A Matter of Law.

The trial judge properly dismissed Count I of Bouton's complaint, as the Court of Appeals has long since upheld the ruling of both this Court and the arbitrator that Bouton was not protected by the collective bargaining agreement while serving as an AHO. Bouton 987 F.2d at 170-171, 172. Consequently, Bouton served at the pleasure of the Governor during his tenure as an AHO and could be removed for cause. See 16 V.I.C. §354(a).

2

See Revised Organic Act of 1954 §23A; 48 U.S.C. §1613a. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§1541-1645 (1995 & Supp. 2002), reprinted in V.I. Code Ann. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp. 2002) (preceding V.I. Code Ann. Tit. 1).

The remaining question to be decided is whether Bouton had a contractual right to resume duties as an assistant attorney general after being terminated as an AHO. Bouton argues on appeal that he only served in a "acting capacity" as an AHO and, during that time, remained an assistant attorney general with the full protections of the collective bargaining agreement. (Appellant Br. At 7-8). The trial judge ruled that even if Bouton was covered by the collective bargaining agreement when he entered into the leave-of-absence agreement with Mercer, his breech of contract claim fails because it violated the terms of the collective bargaining agreement. (J.A. at 7.) The trial judge noted that Article XII of the collective bargaining agreement expressly proscribes private employment contracts between the Department of Law and its employees, thus rendering Bouton's agreement with Mercer a nullity. (Id.) Bouton argues on appeal that, even if his agreement with Mercer was legally invalid, we should give it force because it was an essential condition to his agreement to accept the position as an AHO. (J.A. at 7-8.) This argument fails as "the Government is neither bound nor estopped by the unauthorized or incompetent acts of its agents which the law does not sanction or permit." Hess Oil Virgin Islands Corp. V. Quinn, 16 V.I. 380, 395 (D.C.V.I. 1979); see also In re Hooper's Estate, 359 F.2d 569, 577 (3d Cir. 1966). Accordingly, the trial judge's ruling was proper as a matter of law.

IV. CONCLUSION

As the appellees are entitled to judgment as a matter of law, we will affirm the trial judge's decision to dismiss Bouton's complaint.

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: /s/ Frank Blackman, Deputy Clerk

ORDER

per curiam.

AND NOW, this 4th day of May, 2004, having considered the parties' submissions and arguments, and for the reasons set forth in the accompanying memorandum of even date, it is hereby

ORDERED that the decision of the Territorial Court is affirmed.

ENTERED this 4th day of May, 2004.

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: /s/ Frank Blackman
Deputy Clerk

Copies to:
Judges of the Appellate Panel
Hon. G.W. Barnard
Hon. G.W. Cannon
Judges of the Territorial Court
Donald M. Bouton, Pro Se
Michael Law, AAG
St. Thomas law clerks
St. Croix law clerks
Ms. Nydia Hess
Mrs. Cicely Francis
Mrs. Kim Bonelli

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

DONALD M. BOUTON,
Plaintiff,
vs.
ALEXANDER FARRELLY
in his capacity as Governor of
the Virgin Islands, V.I. DEPARTMENT OF JUSTICE
(formerly Department of Law), and
GOVERNMENT OF THE VIRGIN ISLANDS,
Defendants.

CIVIL NO. 151/1993

ACTION FOR BREACH OF CONTRACT

MEMORANDUM AND ORDER

Before the Court is the Defendants' motion for summary judgment and Plaintiff's cross-motion for summary judgment, both pursuant to Rule 56 of the Federal Rules of Civil Procedure.[1] For the reasons set forth below, Defendants' motion shall be GRANTED and Plaintiff's motion shall be GRANTED with respect to Count One of his complaint.

FACTS

Plaintiff Donald M. Bouton ("Bouton") filed the instant action for breach of contract against former-Virgin Islands Governor Alexander A. Farrelly, the Virgin Islands Department of Justice, and the Government of the Virgin Islands (collectively "the Defendants"). In his complaint, Bouton claims that the Defendants breached their employment contract with him by dismissing him from his position as an Administrative Hearing Officer ("AHO") ("Count One"), and refusing to reinstate him as an assistant attorney general ("Count Two"). (Pl.'s Compl. ¶¶21-22.)

APPENDIX C

---

[1] Made applicable to this Court through Rule 7 of the Rules Governing the Territorial Court of the Virgin Islands.

The factual basis for the termination of Bouton and the resultant procedural history is set forth extensively in Bouton v. Government, 28 V.I. 211, 987 F.2d 162 (3d Cir. 1993). For this Court's purposes, it is enough to note briefly that Bouton, who was employed in various capacities with the Virgin Islands Department of Law,[2] was appointed [in 1986] to the newly created position of [Administrative] Hearing Officer in the Paternity and Child Support Division." Id. at 215, 987 F.2d at 165. Before formally accepting the appointment:

> Bouton wrote to . . . Attorney General (Leroy Mercer) to propose terms for his acceptance of the position. He asked to be placed on a leave of absence, which would allow him to return to his position as an Assistant Attorney General if and when a vacancy occurred, after his term as a Hearing Officer expired. (Attorney General Mercer) wrote "Agreed" on this letter, initialed the document and returned a signed copy to Bouton.

Id. at 215-16, 987 F.2d at 165 (parentheticals added). In 1987, the subsequent Attorney General implemented a new dress-code policy, wherein all male professional employees of the Department of Law were required to wear a coat and tie to work. Id. at 216. 987 F.2d at 165. Bouton refused to comply with the new dress code and filed a grievance pursuant to a collective bargaining agreement ("CBA") that was negotiated between the Department of Law and its assistant attorneys general. Id., 987 F.2d at 165. Ultimately, Bouton was dismissed from his position in March 1987 for failing to comply with the dress code. Id. at 217, 987 F.2d at 166; Farrelly Letter of Mar. 20, 1987 (located at Pl.'s Mem. Of Law in Support of Mot. For Partial Summ. J. & Opp. To Def.'s Mot. For Summ. J. at Ex. 4). The matter was referred for arbitration, and the arbitrator dismissed Bouton's complaint upon concluding that Bouton, as an AHO, was not covered by the CBA. Bouton, 28 V.I. at 218, 987 F.2d at 166. The United States Court of Appeals for the Third Circuit ultimately upheld the

---

[2] In 1987, the Virgin Islands Department of Law was renamed the Virgin Islands Department of Justice. See Revision Note to V.I. Code Ann. Tit. 3, §111.

arbitrator's determination that the CBA did not extend to Bouton. Id. At 224-25, 987 F.2d at 170-71. Bouton subsequently filed the instant suit.

DISCUSSION

In their motion for summary judgment, the Defendants argue that Bouton (1) failed to exhaust his administrative remedies by filing an appeal of his dismissal with Public Employees Relationship Board ("PERB"), and (2) served at the pleasure of the governor, and thus, could be dismissed for cause. (Def.'s Mem. Of Law in Support of Mot. For Summ. J. at 3-5.) The Defendants also contend that Bouton's request for leave and Attorney General Mercer's subsequent agreement did not constitute a valid contract that would allow Bouton to return to his job as an assistant attorney general. (Id. at 5-6.) The Defendants argue that Attorney General Mercer did not have the authority as attorney general to bind the government of the Virgin Islands to an agreement that is outside the CBA. (Id. at 6.)

Bouton notes that the decision of the arbitrator, which ultimately was affirmed by the Third Circuit, disposed of Count One of his complaint. (Pl.'s Mem. Of Law in Support of Mot. For Partial Summ. J. & Opp. To Def.'s Mot. For Summ. J. at 2.) Bouton argues that, because the first two points of the Defendants' motion for summary judgment concern the propriety of his dismissal, they are irrelevant with respect to his failure-to-reinstate claim. (Id. At 2.) In addition, Bouton claims that his promotion to the AHO position was predicated on Attorney General Mercer's grant of a four-year leave of absence from the Department of Law. Bouton argues that either (1) Attorney General Mercer had the authority to grant a leave of absence under Article VIII and Article IX of the CBA, or (2) if Attorney General Mercer did not have the authority to grant such a leave of absence, Bouton never became an AHO and remained an assistant attorney general who was subject to the terms of the CBA. (Id. at 4.)

Rule 56 of the Federal Rules of Civil Procedure provides that judgment shall be rendered in favor of the moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The role of the court, however, is not to weigh the evidence for its truth or credibility, but merely to ascertain whether a triable issue of fact remains in dispute. Suid v. Phoenix Fire & Marine Ins. Co., 26 V.I. 223, 225 (D.V.I. 1991). The nonmoving party receives "the benefit of all reasonable doubts and inferences drawn from the underlying facts." Aristide v. United Dominion Constructors, Inc., 30 V.I. 224, 226 (D.V.I. 1994).[3]

The CBA upon which Bouton relies took effect on October 1, 1983. CBA art. XXI(1). Although initially slated to expire in September 1985, the CBA remained in force through September 1987, thereby covering the time period referenced by this matter. (CBA Stipulation of June 2, 1986.) Article VIII of the CBA, which provides for leaves of absence, states that "[s]uch leaves of absence shall be for a limited time . . . unless such period is enlarged or extended at the request of the employee with the agreement of the Employer not to exceed one (1) years." CBA art. VIII, §5(B). Article IX of the CBA provides, in pertinent part, that "[a]n employee who is promoted to First Assistant Attorney General, Chiefs of the Civil and Criminal Divisions, has a right to revert to an Assistant Attorney General upon termination of his/her appointment at his/her option." CBA art. IX, §10.

As an initial matter, it appears that all parties agree that Count One of Bouton's complaint is no longer a viable issue. This Court agrees that, because the Third Circuit affirmed the arbitrator's finding that the CBA in force during Bouton's tenure as an AHO did not apply to employees in his capacity, that issue cannot be relitigated. Thus, this Court will grant summary judgment as to Count One of the complaint.

With respect to Count Two, Bouton's argument appears to be that, because the alleged contract between him and Attorney General Mercer took place before he was promoted to the AHO position, the

---

3

Overruled on other grounds by St. Thomas-St. John Hotel & Tourism Assn. Inc. v. Virgin Islands, 218 F.3d 232 (3d Cir. 2000).

terms of the CBA still applied to him. Even assuming, arguendo, that Bouton was covered by the CBA at the time that he negotiated a separate agreement with Attorney General Mercer, his breach of contract claim must fail. The CBA, by its own terms, proscribes private employment contracts between the Department of Law and its employees. Article XII of the CBA states that "[t]here shall be no individual contracts relating to terms and conditions of employment between the employer and any employee [or] prospective employee. CBA art. XII, §1. Thus, Bouton's agreement with Attorney General Mercer violated the terms of the CBA, and thus, became a nullity. See Aristide, 30 V.I. at 227.

Bouton further claims that Article IX, Section 10 of the CBA allows him to return to his post as an assistant attorney general after he was dismissed as an AHO. Bouton argues that, had the AHO position existed when the CBA was drafted, Section 10 would allow AHOs to revert to assistant attorneys general as well. (See Pl.'s Mem. Of Law in Support of Mot. For Partial Summ. J. & Opp. To Def.'s Mot. For Summ. J. at 4.)

Leaving aside the semantic question of whether a dismissal for cause is the same thing as the "termination of [an] appointment," Bouton's argument remains unpersuasive. Under the terms of the CBA, the question of whether executive-branch attorneys (other than assistant attorney general) fall within the CBA is left to the PERB. CBA art. I,§3. Neither Bouton, the Department of Law, nor the union who negotiated the CBA on behalf of the assistant attorneys general ever petitioned the PERB for such a determination with respect to AHOs. Additionally, neither party has suggested that the PERB has ever determined that AHOs are covered by an operational CBA, or that such a determination, if indeed one exists, would have retroactive application to Bouton's case. Thus, Bouton may not ask this Court to read into Section 10 a de jure exception for AHOs.

Finally, Bouton argues that the interplay between Section 5(B) of Article VIII and Section 10 of Article IX allows the Government to grant unlimited leaves of absence to employees who are promoted. Bouton claims that, because Section 10 gives promoted employees the

right to return to their previous positions, Section 5(B) by implication allows the attorney general to grant leaves of absence lasting more than one year. (See Pl.'s Mem. Of Law in Support of Mot. For Partial Summ. J. & Opp. To Def.'s Mot. For Summ. J. at 4.) Bouton's syllogism, however, conflates two distinct provisions of the CBA. Article VIII concerns fringe benefits available to employees, including holiday, sick, and annual leave. (See generally CBA art. VIII.) Article IX contains a rubric for determining seniority within the bargaining unit. (See generally CBA art. IX.) Thus, Section 10 of Article IX addresses seniority concerns, not issues of employee leave. To suggest that the leave provisions of Section 5(B) have any thrall over its seniority considerations of Section 10 reads more into the CBA than the plain text of the document contemplates. Accordingly, this Court will reject Bouton's interpretation of Article VIII and Article IX of the CBA.

ORDER

In accordance with the foregoing, the premises considered, it is hereby

ORDERED, that the Defendants' "Motion for Summary Judgment" is GRANTED; and, it is further

ORDERED, that Plaintiff's cross-motion for summary judgment is GRANTED with respect to Count One of Plaintiff's Complaint; and, it is further

ORDERED, that Plaintiff's Complaint is DISMISSED with prejudice; and, it is further

ORDERED, that copies of this ORDER shall be directed to the parties' counsel of record.

DATED: June 7, 2005

/s/ Rhys S. Hodge
Judge of the Territorial Court of the
Virgin Islands

ATTEST: /S/ Denise D. Abramsen, Clerk of the Court

GOVERNMENT OF THE VIRGIN ISLANDS
OF THE UNITED STATES

OFFICE OF COLLECTIVE BARGAINING
Office of the Governor
P.O. Box 580
Charlotte Amalie, St. Thomas, V.I. 00801
CHIEF NEGOTIATOR ALDA M. MONSANTO
Phone 809/774-6450

STIPULATION

It is hereby stipulated and agreed by and between the Government of the Virgin Islands, Department of Law, and the Seafarers International Union on behalf of the employees in the Assistant Attorneys General bargaining unit as follows:

1. That the current collective bargaining agreement between the parties did expire on September 30, 1985;

2. That the current collective bargaining agreement between the parties was extended until midnight of the thirty-first day of January, 1986;

3. That the current collective bargaining agreement between the parties is further extended until midnight of the thirtieth day of September, 1987, except that Article XVII (SALARY) only shall be reopened for negotiations upon forty-eight (48) hours notice by either party. The parties shall meet within seventy-two (72) hours of such notice.

GOVERNMENT OF THE VIRGIN ISLANDS
By: /s/ Alda M. Monsanto, Chief Negotiator
Dated: April 29, 1986

SEAFARERS INTERNATIONAL UNION
By: /s/ Amos A. Peters, Assistant Vice President
Dated: May 21, 1986

APPENDIX D

APPROVED:
/S/ Juan Luis, Governor
Dated: June 2, 1986

PREAMBLE

THIS AGREEMENT is entered into this 28th day of Feb., 1983, by and between the Government of the Virgin Islands ("Government"), ("Attorney General"), ("Employer"), or ("Office") and the United Industrial Workers, Service, Transportation, Professional and Government Workers of North America, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO ("Union").

The purpose of this Contract is to achieve and maintain harmonious and effective relations among the Employer, the Union, and the Employees to:

a. preserve the legally mandated role and responsibilities of the Attorney General and Attorneys practicing law on behalf of the Executive Branch of the Government;

b. establish a high degree of professionalism within the Office; and

c. provide for a procedure to adjust equitably and peaceably any differences, controversies, or disputes that may arise among the Employer, Employees and Union.

Therefore, in consideration of the mutual covenants, conditions and agreements contained within this Contract, the parties mutually agree as follows:

ARTICLE X
GRIEVANCE AND ARBITRATION PROCEDURE

Section 1: Grievance Defined

For the purpose of this Agreement, a grievance is defined as a complaint, dispute or controversy between the parties which requires interpretation, application or performance of this Agreement.

Section 2: Exclusive Procedure

The following alternative procedures, which may be initiated by either party, shall be the exclusive means of settlement of all grievances arising under this Agreement.

Section 3: Employee-Grievant

All reasonable work time spent by the Employee-Grievant during working hours in filing, discussion, investigation and processing of a grievance shall be with pay. The Employee-Grievant shall act diligently and expeditiously in undertaking the above. The Employee shall still be held responsible for his job or work assignments during the time he is pursuing the above.

Section 4: Initial Procedure

The procedure to be followed for the processing and disposition of grievances shall be as follows:

The matter will first be reduced to writing and discussed by and between the aggrieved employee (or employees) and the Attorney-General or his designee not later than ten (10) working days after its occurrence or after the employee knew or should have known of the matter complained of. If the employee reasonably believes that disciplinary action may be involved, he may request that the Shop Steward attend such meeting. The Attorney-General or his designee shall within seven (7) working days of said discussion advise the employee and, where appropriate, the Shop Steward of his decision.

Section 5: Demand for Arbitration and Selection of Arbitrators

If the Attorney General's final answer is not satisfactory to the Union and the grievant within fifteen (15) calendar days after receipt of the Attorney-General's final answer the Union shall present the Attorney-General with a written notice of its desire to arbitrate. When a demand for arbitration has been thus presented, unless the parties agree on an Arbitrator, in writing, within ten (10) working days either party may request the American Arbitration Association to supply them with a panel of five (5) impartial arbitrators. Each party shall alternately strike one name from the list, commencing with the party seeking arbitration, until only one name remains. The name of the person last

appearing on the list shall be designated as Arbitrator whose appointment shall be binding on both parties.

Section 6: Authority of the Arbitrator

The Arbitrator shall not have the authority to add to, subtract from or modify the express provisions of this Agreement.

Section 7: Effect of Arbitration Award

The Arbitrator's award rendered within the limitations of section 2 of this Agreement shall be final and binding on the aggrieved employee or employees, the Union, and the Employer and shall be enforceable in any court of competent jurisdiction.

Section 8: Arbitration Expense

Expenses and fees of the Arbitrator, including the cost of a transcript of the hearing, shall be equally divided between the Employer and the Union. Otherwise, each party shall pay its expenses.

Section 9: Time Limits

A. The time limits set forth in this Article shall be binding on the parties unless extended in writing, and the processing of a grievance to arbitration shall not waive the right of a party to assert before the Arbitrator that the grievance was untimely at an earlier step, if that issue has been raised and asserted as a defense at an earlier step.

B. If the Union fails to process a grievance to the next step within the time limits provided, the grievance shall be considered disposed of on the last answer of the Employer.

C. If the Employer fails to provide its answer to a grievance within the time limits provided, the grievance shall be considered automatically appeal to the next step.

Section 10: Definition of Working Day

Whenever used in this Article, the term "working day" means each week day or Monday through Friday, exclusive of holidays.

Section 11: Discharge, Demotion or Suspension Grievances

A. The Employer will promptly advise the Shop Steward of any discharge, demotion or suspension action to be taken and the employee will be allowed to discuss such action with the Shop Steward prior to leaving his Employer's facility, which discussion shall take place immediately.

B. Any grievance over a discharge, demotion or suspension shall be filed in writing to the Attorney-General or his designee within ten (10) working days.

Section 12: Grievance Priority

Should several disputes, controversies and/or grievances be pending at the same time, those concerning discharge, lay-off or disciplinary measures shall be given first priority in grievance processing and arbitration.

Section 13: Stipulated Facts

In the event that the parties are in agreement as to all of the facts bearing upon any grievance, they may submit the grievance to the Arbitrator by means of a written stipulation of facts and they may agree to waive a formal hearing. Any waiver of hearing shall be in writing, executed by the parties thereto.

Section 14: Failure to Attend Hearing

The failure of any party or witness to attend an arbitration hearing except as to extraordinary and extenuating circumstances as scheduled by the Arbitrator shall not delay the hearing and the Arbitrator is hereby authorized to proceed to take evidence and to issue n award as though such party or witness was present, except that the Employer may have a designee in attendance at such hearing to represent its interest.

Section 15: Reinstatement of Discharged Grievant

If a discharge grievance is filed and upheld by an arbitration award providing for reinstatement and back pay, the grievant shall be promptly reinstated with back pay pending the final disposition of any appeal that the Employer may file.

ARTICLE XIX
DISCIPLINE AND DISCHARGE

Section 1: Rights of Discipline

The Department retains the exclusive right to discipline, discharge or suspend an employee for just cause.

Section 2: Disciplinary Procedure

Except as enumerated in section 3 hereof, disciplinary action shall not be implemented and made a part of employee's permanent personnel record until the employee shall have first been notified of the proposed disciplinary action and has had an opportunity to file a grievance on the proposed action and, if a grievance is filed, a decision on the disciplinary action to be taken has been rendered at Step 2 of the Grievance Procedure contained in Article X, §4.

Section 3: Misconduct Warranting Immediate Disciplinary Action

The Attorney-General, or in his/her absence, the First Assistant Attorney General, shall have the right to immediately discipline an employee, up to and including discharge, for the commission of one of the following offenses:

a. theft, embezzlement of dishonesty;
b. fighting;
c. gambling;
d. consumption of alcoholic beverages during working hours; reporting for work intoxicated;
e. sale, purchase or illegal use of narcotics or other forbidden drugs;
f. deliberate destruction or removal of the Department's property, or that of another employee;
g. giving or taking a bribe of any kind.

The foregoing enumeration of causes for discipline is by way of illustration and shall not be deemed to exclude the Department's right to discipline an employee, up to and including discharge, for any other cause. Where the Department determines to discharge an employee for a cause to hereinabove enumerated, the Department shall have the right to suspend said employee with pay pending the processing of a grievance, if any, through the Grievance and Arbitration procedure contained in Article X.

Section 4: Complaint Confrontation

An employee shall have the right to respond orally or in writing to any complaint made against him to the Department. No disciplinary action shall be taken by the Department without an investigation and substantiation of the complaint. In any grievance arbitration the employee shall have the right of confrontation and cross-examination of his accuser.

ARTICLE XVIII
LABOR-MANAGEMENT COMMITTEE

Section 1:

The Employer and the Union agree to establish a joint Labor-Management Committee, consisting of four representatives from each side. The Committee will meet at the call of either side and not less often than once each calendar quarter. Minutes and proceedings of the meetings shall be kept by the Secretary. Agenda items will be submitted by either party three (3) working days in advance of each meeting.

Section 2:

An equal number of Union and Employer representatives will attend the schedule meetings. Union representatives who are also employees will suffer no loss of pay for time spent in attendance at such meetings held during work time. The Chairmanship shall be rotated between Union and Management with each meeting and the Secretary shall be selected from the opposite group.

Section 3:

The joint Labor-Management Committee will have as its purpose and shall give consideration to such matters as: the interpretation and application of rules, regulations and policies; the correction of conditions resulting in grievances and misunderstandings; the encouragement of good human relations in employee-supervisory relationships; the betterment of employee working conditions; the strengthening of employee morale; the implementation of Equal Employment Opportunity and related matters; recommendations concerning conditions affecting the health and safety of employees.

It is expressly agreed that individual grievances will not be discussed during Committee hearings.

ARTICLE XXI
DURATION AND BINDING EFFECT

1. This Agreement shall become operative on 12:01 a.m. of the first day of October, 1982, and shall expire on midnight of the 30th day of September, 1985, except that Article XVII, section 1 shall be subject to renegotiation for the third year of this Contract, upon notice by either party at least thirty (30) days in advance of the beginning of each fiscal year.

2. This Agreement shall have no effect and shall be unenforceable unless signed by the Governor of the Virgin Islands provided, further, that any portion of this Agreement requiring legislative action to permit its implementation by providing additional funds therefor, shall not become effective until the Legislature of the Virgin Islands has enacted appropriate implementing legislation.

3. This Agreement shall automatically be renewed from year to year following its expiration unless either party shall have notified the other in writing at least ninety (90) days prior to expiration of an intent to commence negotiations on a new contract. In the event of such notice, negotiations shall commence not later than sixty (60) days prior to expiration.

GOVERNMENT OF THE VIRGIN ISLANDS
OF THE UNITED STATES
Department of Law
P.O. Box 280
Charlotte Amalie, St. Thomas, V.I. 00801

MEMORANDUM

TO: Donald M. Bouton
Assistant Attorney General
FROM: Leroy A. Mercer
Attorney General
Re: Assignment
DATE: March 7, 1986

In response to your request via memorandum of March 6, 1986, you shall not be appointed to the position of Administrative Hearing Officer. You will continue on your present assignment in the Paternity and Child Support Division until further notice.

Cc: Jo Alene Kirkel
Acting Chief, Paternity and Child Support Division

APPENDIX E

GOVERNMENT OF THE VIRGIN ISLANDS
OF THE UNITED STATES
Department of Law
P.O. Box 280
Charlotte Amalie, St. Thomas, V.I. 00801

September 17, 1986

The Honorable Leroy A. Mercer
Attorney General
P.O. Box 280
Charlotte Amalie,
Virgin Islands 00801

Re: Appointment to the position of Administrative Hearing Officer

Dear General Mercer:

I received today a Notice of Personnel Action appointing me to the position of Administrative Hearing Officer, effective August 5, 1986.

I agreed to accept this appointment on the condition that I be granted a leave of absence from my position as Assistant Attorney General. It is my understanding that you have agreed to this condition to the extent that I would resume employment as an Assistant Attorney General in the first vacancy occuring after the termination, by resignation or otherwise, of my service as Administrative Hearing Officer.

If I have misstated the terms of our agreement, please advise.

Respectfully,

/s/ Donald M. Bouton

cc: Jo Alene Kirkel, Esq., Acting Chief
Division of Paternity & Child Support

THE VIRGIN ISLANDS OF THE UNITED STATES
Office of the Governor
Charlotte Amalie, St. Thomas, V.I. 00801

March 20, 1987

Donald M. Bouton, Esquire
Hearing Officer
Division of Paternity and Child Support
Department of Law
Charlotte Amalie
St. Thomas, Virgin Islands 00801

Dear Mr. Bouton:

You are hereby dismissed, for cause, from your position of Hearing Officer, Department of Law, Division of Paternity and Child Support, as of the close of business today. The causes of your dismissal are continued insubordination and conduct unbecoming an employee in your position. You are dismissed for each cause as well as for both.

Cordially,

/s/ Alexander A. Farrelly, Governor

GOVERNMENT OF
THE VIRGIN ISLANDS OF THE UNTIED STATES

DEPARTMENT OF LAW
P.O. Box 280
Charlotte Amalie, St. Thomas, V.I. 00801

March 20, 1987

TO: Godfrey R. de Castro, Acting Attorney General

FROM: Donald M. Bouton, Hearing Officer

RE: Resumption of position of assistant attorney general

The Governor's letter of this date which stated that my appointment as hearing officer was terminated, neglected to enclose a NOPA appointing me to one of the vacant assistant attorney general positions. It is my understanding that the position which I occupied at the time my leave of absence was granted, is vacant, along with some others.

Please advise Attorney Alexis to whom and when I should report for duty. He will know how to reach me.

/s/ Donald M. Bouton

cc: Atty. Alexis